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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 46

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

DEENA ARTWARE, INCORPORATED, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court below in the instant contempt proceeding (R. 74), dated December 13, 1958, is reported at 261 F. 2d 503. Earlier relevant opinions of the Court of Appeals are as follows: (1) opinion of July 30, 1952 (R. 1), upholding and directing enforcement of the Board's back pay order, 198 F. 2d 645, certiorari denied, 345 U.S. 906; (2) opinion of November 10, 1953, denying the Board's application for an order of discovery and for an injunction restraining Deena Artware from transferring certain funds to its parent corporation, Deena

Products, Inc., 207 F. 2d 798; (3) opinion of December 16, 1955 (R. 2), upholding and directing enforcement of the Board's supplemental back pay order, 228 F. 2d 871; (4) opinion of January 17, 1958, denying Board's application for an order of discovery, 251 F. 2d 183.

JURISDICTION

The judgment of the court below (R. 73) was entered on December 13, 1958. The petition for a writ of certiorari was granted on May 4, 1959 (359 U.S. 983; R. 92). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151 *et seq.*) are as follows:

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10 * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act * * *

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. * * * The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review * * * by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U.S.C. title 28, secs. 346 and 347).

QUESTIONS PRESENTED

In a petition to adjudge respondents in civil contempt for refusing to pay certain amounts of back pay due to various employees as a result of their discriminatory discharge by respondent Deena Artware, the

Board alleged (1) that between the date of entry of the Court of Appeals' decree enforcing the Board's original back pay order and the court's entry of a supplemental decree approving the Board's determination of the specific amounts of back pay due, respondents had siphoned off the assets of Deena Artware for the purpose of avoiding payment of any back pay found to be due and owing, and (2) that respondents are integral parts of a single enterprise and, as such, were and are answerable to the court's decrees, which explicitly run against Deena Artware and its officers, agents, successors and assigns.

The questions presented are:

1. Whether the court below properly held that acts calculated to frustrate a decree for back pay cannot serve as a basis for civil contempt proceedings where it appears that such acts were performed in the interval between entry of the original unliquidated back pay decree and entry of the supplemental decree fixing the specific amounts of back pay due.

2. Whether, in any event, the court below erred in dismissing the petition for contempt without determining whether respondents, or any of them, are answerable to the supplementary decree as "officers, agents, successors, and assigns" of Deena Artware.

STATEMENT

Events prior to the contempt proceedings. On October 25, 1949, the Board issued its Decision and Order against Deena Artware. 86 NLRB 732, 9 NLRB 9. The Board found that Deena Artware had violated the National Labor Relations Act by discharging and refusing to reinstate 66 of its employees

who had engaged in a strike. The Board directed "Deena Artware, Incorporated, Paducah, Kentucky, and its officers, agents, successors, and assigns" to offer reinstatement to the discharged employees and to make them whole for any loss of pay suffered by them as a result of the discrimination against them. To this end, the employer was directed to pay each of them a sum equal to the amount which he normally would have earned as wages during the period of displacement, less net earnings received during such period from other employment.

On July 30, 1952, the court below affirmed the Board's decision with respect to 62 of the 66 employees involved and entered a decree enforcing the Board's order (R. 1). This Court denied Deena Artware's petition for a writ of certiorari, 345 U.S. 906.

On or about March 4, 1953, Deena Artware offered reinstatement to all of the strikers. Shortly thereafter, however, Deena Artware closed its various departments. It has never resumed operations and has paid no back pay to any of the employees in question.

On April 9, 1953, the Board applied to the court below for an order restraining Deena Artware from making a partial assignment to Deena Products, Inc. ("Products"), its parent corporation, of the proceeds of a judgment recovered by the former. At the same time, the Board filed application for an order permitting discovery, alleging in support that the affairs of the two corporations were being conducted in such a way as to dissipate the assets of Deena Artware for the purpose of avoiding its back pay obligations (then unliquidated). The court below denied these motions on November 10, 1953, holding that, until the amount

of back pay was liquidated and payment of the fixed sum refused, there was no warrant for action on its part. 207 F. 2d 798. The court added (at p. 802) that if, upon liquidation, "any financial inability on the part of [Deena Artware] to pay the awards is shown to be the result of improper actions on its part in the meantime, appropriate contempt action can then be taken."

Thereafter, the Board held hearings, and on April 21, 1955, issued its Supplemental Decision and Order determining the specific amounts of back pay due to the individual employees involved. The order directed Deena Artware, its officers, agents, successors, and assigns to pay those amounts, which totaled approximately $300,000.00. 112 NLRB 371.

On December 16, 1955, the court below affirmed the Board's supplemental decision and entered its own supplemental decree, which was similarly directed against Deena Artware, its officers, agents, successors and assigns (R. 2).

In 1957, the Board moved the court below for discovery, inspection and depositions, naming Deena Artware, its President (Weiner), Products, and Products' other subsidiaries (Deena of Arlington, Inc., Sippi Products Company, Inc., and Industrial Realty Company, Inc.). The Board alleged that Weiner, who controlled Products and its various subsidiaries (including Deena Artware), had caused the assets of Deena Artware to be siphoned off through the other corporations under his (Weiner's) control for the purpose of evading the back pay obligations. The motion for discovery was made in order to enable the Board to show facts which would warrant a contempt adjudi-

cation requiring payment of the back pay by Deena Artware, its affiliated companies and their officers.

On January 17, 1958, the court below, with Judge (now Mr. Justice) Stewart dissenting, denied the Board's motion. 251 F. 2d 183. The court held (at p. 187) that, in the absence of contempt proceedings, a motion for discovery and inspection was premature and that the "proper procedure would seem to be through contempt proceedings, by which the issue would be raised whether the allegations of the pleading legally constitute contempt."

The contempt proceedings.—On August 20, 1958, the Board petitioned the court below (R. 3) to hold Deena Artware, Weiner, Products and its affiliated corporations in civil contempt. The Board also renewed its motion (R. 34) for discovery, inspection and the taking of depositions.

The petition alleged that Deena Artware, Weiner, and the affiliated corporations had failed and refused to compensate the aggrieved employees. In support of the prayer that respondents be adjudged in contempt and that an order be entered directing respondents to purge themselves of contempt by paying the sum of back pay due to the various employees, the petition alleged as follows:

Deena Artware is, or was, one of several wholly owned subsidiaries of Products, an Illinois corporation engaged in the manufacture and sale of lamps. In recent years, the manufacturing processes have been performed by Products' various subsidiaries (including Deena Artware) and Products has confined itself largely to sales and distribution. Products organized Deena Artware in 1946 as a Kentucky corporation to

acquire a small pottery plant at Paducah for the manufacture of china urns for lamp bases. The organization was started with insufficient capital. Other subsidiaries include Sippi Products Co. ("Sippi"), organized in 1948 to operate a similar plant at Wickcliffe, Kentucky; Deena of Arlington, Inc. ("Arlington"), formed to operate a lamp assembly and shade plant at Arlington, Kentucky; and Industrial Realty Co., Inc. ("Industrial"), a Kentucky corporation organized about November 1954, after Deena Artware allegedly terminated active operations, to hold title to Deena Artware's plant and other physical assets. At all relevant times, Products has owned virtually all the shares of each of the subsidiaries; and George H. Weiner, who owns virtually all the stock of Products, has been president and treasurer of Products and of each of the subsidiaries, and has been a director in each corporation (the other directors having been his wife, son and secretary).

The subsidiaries (except Industrial) manufacture for, and sell to, Products and/or the other subsidiaries exclusively at prices fixed by Products. Products and Weiner have provided the subsidiaries with their raw materials and supplies and have maintained management and overall supervision of the plants and production of the subsidiaries. The parent company has maintained the books and records of the subsidiaries at its Chicago offices, managed and controlled their funds and bank accounts, commingled the funds and property of the subsidiaries with those of Products, and regularly furnished consolidated financial statements to credit agencies and creditors representing that the subsidiaries are integral parts of Products.

About December 1947, Products began construction of a new factory building adjacent to Deena Artware's plant at Paducah, Kentucky, with a view to making possible the completion of the lamp manufacturing process at Paducah. It was intended that the new plant should use the urns produced by Deena Artware and build the finished lamps—a task then being performed by Products in Chicago. Construction was abandoned at Paducah in about July 1948, in favor of a new site at Arlington, Kentucky. Although the abandoned plant had been intended for Products' use, and not Deena Artware's, following May 1948, when the unfair labor practices were committed, Deena Artware was charged with the plant construction costs. But when the abandoned plant's unused construction materials, engineering and architectural plans and services were subsequently used in the construction of the new plant at Arlington, Deena Artware was not credited with their value.

About March of 1949, following the hearings in the unfair labor practice proceeding; Products and Weiner caused Deena Artware to lower its price—despite an increase in costs—on the urns which it manufactured and sold exclusively to Products. As a consequence, Deena Artware showed losses for its operations and Products made substantial profits on the sale of the completed product.

On October 31, 1949, six days before the issuance of the Board's Decision and Order in the unfair labor practice proceeding, Products and Weiner caused Deena Artware, in order to guarantee the latter's alleged indebtedness to Products, to execute a promissory note to Products for $75,459.65, payable within five

years, with interest at 6 percent payable semi-annually. This note was secured by mortgages on Deena Artware's real and personal property. On or about September 19, 1952, Deena Artware executed further mortgages, allegedly to secure another promissory note payable to Products.

On December 16, 1952, following entry of the enforcement decree by the court below, Products and Weiner caused Deena Artware to make a partial assignment to Products of the proceeds of a judgment recovered by Deena Artware (a judgment against the union involved in the unfair labor practice proceedings before the Board). On or about January 22, 1954, Products received $19,320.97 under this assignment.

In April 1953, Products and Weiner caused Deena Artware to cease all operations. Thereafter, Products received from Sippi the supplies it had customarily received from Deena Artware. Until November 1954, Sippi and Products, without payment, used Deena Artware's plant premises, facilities and properties at Paducah.

On November 24, 1954, upon maturity of the promissory note of October 31, 1949, and apparently in lieu of foreclosure proceedings, Products and Weiner, with knowledge of the proceedings before the Board to determine the exact amounts of back pay due, caused Deena Artware to convey all of its real and personal property to Products in cancellation of its then alleged indebtedness of $105,000, leaving as Deena Artware's sole unsatisfied obligation the back pay due under the decrees herein. Deena Artware has engaged in no business activities since this transfer.

Thereafter, in May 1955, Products and Weiner conveyed the former Deena Artware plant and equipment

to a newly organized subsidiary, Industrial Realty Co., Inc., which continues to hold the legal title to the properties. Products and Weiner then caused Industrial to lease the plant and equipment to Sippi, which has occupied and operated it as a branch of its principal plant at Wickcliffe. The former manager for Deena Artware has since managed the Arlington plant and has had general supervision over the two Sippi plants. The same equipment, production, and manufacturing and distribution arrangements exist at the new Sippi branch plant as existed when the plant was operated by Deena Artware.

The theory of the petition was (1) that, during the period between the entry of the court's decree enforcing the Board's initial back pay order (July 30, 1952) and the court's supplemental decree enforcing the Board's supplemental order (December 16, 1955), Weiner, Products and the affiliates had caused the affairs and business of Deena Artware to be conducted in a manner which divested Deena Artware of its assets, for the purpose of preventing and frustrating compliance with the decrees of the court below; and (2) that Weiner, Products and the various subsidiaries (including Deena Artware) were integral parts of a single enterprise, and the insolvency of Deena Artware could not relieve the other respondents of their obligations, as officers, agents, successors or assigns, to comply with the back pay decrees.

Deena Artware moved that the petition be dismissed, asserting that there was no claim which would warrant the requested relief (R. 15). It also filed an answer admitting certain of the allegations, denying the allegations of fraud or wrongdoing on its part, and affirma-

tively alleging that the transactions complained of were bona fide business transactions, and that the notes, mortgages, assignment and conveyance were duly, regularly and properly executed, for adequate and proper consideration and for value given (R. 15-30). Weiner and the other affiliated corporations moved that the petition be dismissed for want of jurisdiction (R. 31-34). Alternatively, they adopted as their own the allegations of the answer filed by Deena Artware (*ibid.*).

The decision of the court below.—The court below granted the motions of Deena Artware, Weiner and the affiliated corporations to dismiss the contempt petition for failure to state a cause of action, and denied the motion of the Board for discovery, inspection and the taking of depositions (R. 73). It reasoned that, under 18 U.S.C. 401(3), the refusal to comply with a back pay award, when one is financially able to do so, is contempt of court, but that at least since December 16, 1955, the date of the supplemental decree, Deena Artware had been financially unable to pay the awards, so that its failure to pay at any time after this date could not furnish a basis for contempt proceedings.

Insofar as the petition alleged that Deena Artware, Weiner, Products and the affiliates had taken steps, between the dates of the two decrees, in furtherance of a scheme to divest Deena Artware of its assets for the purpose of frustrating and preventing compliance, the "decisive question" for the court was "the effective date for the purpose of contempt proceedings of the order or decree of this Court which it is alleged the

respondents have disobeyed." On this point the court below held (R. 82, 84):

> Acts of a respondent *prior* to the entry of the order or judgment which he is charged with disobeying, do not constitute contempt of court, regardless of the intentions of the respondent to avoid the impact of an order, or judgment expected by him to be thereafter entered.
>
> * * * * *
>
> * * * We are of the opinion that the enforcement order of July 30, 1952, which left undecided and undisposed of the amounts of back pay which any individual employee would be entitled to receive, was not sufficiently definite and mandatory to serve as the basis for contempt proceedings, and that the order which must serve as the basis for such proceedings is the supplemental decree of December 16, 1955.

Since the transactions alleged to have resulted in the dissipation of Deena Artware's assets occurred prior to December 16, 1955, there was, in the opinion of the court below, no basis for treating them as contumacious.

The Court of Appeals did not discuss the allegations by the Board that Weiner and the corporate affiliates, as part of the same enterprise, or as the alter egos, successors or agents of Deena Artware, were responsible for payment of the back pay, and therefore in contempt of the supplemental decree.

SUMMARY OF ARGUMENT

I

When an employer and others identified with it engage in a course of conduct designed to defeat payment of back pay under a Board order, such purposeful conduct taking place in the interval between the entry of a decree enforcing the order in general terms and the entry of a supplemental decree fixing the specific amounts due, they are chargeable with contempt. An enforcement decree which directs a respondent to make employees whole for loss of wages attributable to illegal discrimination against them is analogous to an ordinary interlocutory judgment fixing liability but leaving for future determination questions as to the precise amount of the money obligation. Such a decree or judgment, although it contemplates further action for the purpose of computing the specific amounts due, is final and conclusive insofar as it determines the obligor's liability to compensate the injured parties.

The effect of the enforcement decree entered in this case was to impose a fixed and immediate obligation upon the employer to stand ready to discharge its liability and make payment of whatever specific sums were ultimately found due. This meant, at a minimum, that the employer had the duty, during the pendency of the supplemental proceedings, to refrain from acts calculated to defeat the employees' adjudicated rights. To hold otherwise would be to treat the case as if an enforcement decree had never been entered and to sanction a technique of evasion which could sap the back pay remedy of its effectiveness.

II

The court below also erred in refusing to permit proof of the Board's claim that Weiner, Products, and Products' subsidiaries are alter egos, successors, and assigns of Deena Artware and, being solvent, are in contempt of the supplemental decree for their failure and refusal to pay the back pay awards. The Board's allegations—which, for present purposes, must be taken as true—establish that these respondents, together with Deena Artware, constitute a single integrated enterprise commonly owned and controlled; that Deena Artware's business and assets remain within the family of interrelated corporations; and that the diversion of business and transfer of assets which have taken place had the object of frustrating the judgment. In such circumstances, the controlling principle is that stated by this Court in *Regal Knitwear Co.* v. *National Labor Relations Board*, 324 U.S. 9, 14: "* * * Labor Board orders are binding upon successors and assigns who operate as 'merely a disguised continuance of the old employer.'"

ARGUMENT

I

When an Employer, Between the Time of Entry of an Enforcement Decree Directing It to Make Employees Whole for Loss of Wages and the Entry of a Supplemental Decree Fixing the Specific Amounts to Be Paid, Diverts or Dissipates Its Assets for the Purpose of Frustrating the Employees' Adjudicated Rights, It Is Guilty of Contempt

Congress has empowered the Board, if it finds that an employee has been discriminatorily discharged, to direct the offending employer "to take such affirma-

tive action including reinstatement of employees with or without back pay, as will effectuate" the policies of the Act. Section 10(c), *supra*, p. 2. A direction to make employees whole, entered at the conclusion of an unfair labor practice hearing, rarely specifies the amount of back pay due the injured employees. Indeed, the Board does not normally take any evidence, in the course of the unfair labor practice hearing, concerning the amount of back pay due, if any. Its practice is to defer that computation until after the order in its unfair labor practice proceeding has issued. Accordingly, the Board's initial order, when it has found that an employee has been discriminated against, characteristically directs the offending party to make the employee whole for any loss of pay suffered by reason of the discrimination against him by the payment of a sum of money equal to the amount which he would have earned as wages during the operative period of the discrimination, less his net earnings from other employment during such period.

If the party to whom such an initial order is directed fails to comply with it, the Board seeks enforcement in the appropriate court of appeals. If the court approves the Board's order, it enters its own decree

[1] The Board's practice in this respect, which was noted in *Nathanson v. National Labor Relations Board*, 344 U.S. 25, 29, avoids injecting the collateral and premature issue of back pay into the unfair labor practice hearing. Obviously, when that hearing takes place there is no assurance that either the Board or a reviewing court will conclude that an unfair labor practice has been committed. *See National Labor Relations Board v. Mexia Textile Mills, Inc.*, 339 U.S. 563, 569; *Merchandise Co.*, 134 F. 2d 949, 951 (C.A. 2). Furthermore, a hearing on the back pay issue often proves unnecessary since a large number of cases are settled through informal negotiations after the Board's order issues or is enforced by a court of appeals.

(invariably, in the general language of the Board's order) directing the employer to make whole the employee or employees for wage losses sustained as a consequence of the discrimination. If, thereafter, the Board and the employer are unable to agree upon the amounts of back pay due, the Board conducts a formal hearing on that supplementary issue. After taking evidence, it makes its computation and issues its supplemental order fixing the amount due and directing its payment.[1] In the event of non-compliance, the Board's remedy, once again, is to seek enforcement through the court of appeals; in such instance, through entry of a supplementary court decree enforcing the Board's order and directing the payment of the specific amounts of back pay found to be due.[2]

Such was the procedure followed in the instant case. The court below entered its decision enforcing the

[illegible]

Board's initial back pay order on June 30, 1952. When respondent Deena Artware and representatives of the Board were unable to reach agreement with respect to the amounts due to the 62 employees involved, the Board ordered a formal hearing, which was held in 1954. The Board, in April 1955, issued its supplemental decision and order determining and directing the payment of the specific amounts of back pay found to be due to the individual employees, and in December of that year the court below entered its supplemental decree enforcing that order.

As set forth in the Board's contempt petition, the dispute in this case arises from the fact that, between the dates of entry of the Court of Appeals' enforcement decree and its later supplemental decree, respondents, in order to frustrate payment of back pay awards, caused Deena Artware to transfer its funds, its plant, its equipment and its business to affiliated corporations (which are also respondents here). The issue thus posed is whether an enforcement decree which directs the payment of back pay, but does not fix the specific amounts due, imposes a binding obligation to refrain from acts which would frustrate satisfaction of the employees' adjudicated rights. In concluding that the original enforcement decree creates

F. 2d 667, 668 (C.A. 5); *West Texas Utilities Co., Inc. v. National Labor Relations Board*, 195 F. 2d 519, 201 F. 2d 668 (C.A. 5); *National Labor Relations Board v. Cambria Clay Products Co.*, 215 F. 2d 48, 56 (C.A. 6); *National Labor Relations Board v. Hudson-Walker Refractories Co.*, 135 F. 2d 837, 137 F. 2d 390, 397 (C.A. 8); *National Labor Relations Board v. Bruce A. Rice, Inc.*, 203 F. 2d 139, 147 (C.A. 8); *National Labor Relations Board v. Cudahy Packing Co.*, 94 F. 2d 138, 146-147 (C.A. 9); *National Labor Relations Board v. Overseas Rivet Workers' Union*, 207 F. 2d 424, 426-427 (C.A. 9); *National Labor Relations Board v. Matson Steamship Co.*, 211 F. 2d 357, 360-361 (C.A. 9).

no effective obligation and that there can be no contempt until the amounts to be paid are liquidated, the court below, we believe, has misconceived the legal effect of the enforcement decree and has overlooked the distinction between mere non-payment of an unliquidated obligation and fraudulent conduct designed to avoid ultimate payment.

"A back pay order is a reparation order designed to vindicate the public policy of the statute by making the employees whole for losses suffered on account of an unfair labor practice." *Nathanson* v. *National Labor Relations Board*, 344 U.S. 25, 27; *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U.S. 177, 197. An enforcement decree which directs, in terms of the Board's generalized formula, that back wages be paid to employees who have suffered discrimination is "analogous to interlocutory judgments of courts fixing liability but leaving for future determination questions as to amount of liability * * *." *Wallace Corp.* v. *National Labor Relations Board*, 159 F. 2d 952, 954 (C.A. 4). Such a decree, although it contemplates the need of making computations, is final and conclusive insofar as it determines the employer's liability to make compensation. As this Court has stated of a decree indistinguishable from the enforcement decree involved here, "the order was definite and complete; it contemplated only arithmetical computation." *International Union of Mine, Mill & Smelter Workers* v. *Eagle-Picher*, 325 U.S. 335, 341. Similarly, as the Court noted in holding that such a decree entitled the Board to file a claim in bankruptcy, the "order is a command to pay an amount owed the Board as agent for the injured employees. * * * The Board

has eliminated the discrimination by the back pay order; and enforcement of its order has been directed by the Court of Appeals. The full sanction of the National Labor Relations Act has therefore been placed behind the order." *Nathanson, supra*, 344 U.S. at 27-28.

This "command", which has behind it the "full sanction" of the Act, surely imposes upon the employer a fixed and immediate obligation to stand ready to discharge his liability and make payment of whatever specific sums may ultimately be found due.

At a minimum, there is a duty, during the pendency of the supplemental proceedings, to refrain from acts which would undermine the decree already entered. To attribute less than that to the decree would be to treat the case "as if an enforcement decree had never been entered." *Eagle-Picher, supra*, 325 U.S. at 340. It would be an empty rite to order restitution by formal administrative order and court decree if it nonetheless remained open to the party charged with liability to take steps designed to prevent satisfaction.

To be sure, the enforcement decree does not direct the payment of any specific sum. But the fact that the amounts to be paid have not become finally fixed cannot be taken to mean that in the meantime a respondent can purposefully and permanently disable itself from carrying out the command of the enforcement decree. Obviously, until the amounts to be paid become liquidated there can be no adjudication in contempt for mere non-payment.[3] But that is not this

[3] *National Labor Relations Board* v. *Draper Corp.*, 159 F. 2d 294, 298 (C.A. 1); *National Labor Relations Board* v. *New York Merchandise Co.*, 134 F. 2d 949, 952 (C.A. 2).

case. Here (assuming, as one must, that the allegations of the petition are true), the offense lies in the "studied course of conduct", following entry of the decree which finally determined the obligation to make restitution, designed to deprive the employees "irretrievably of the fruits of the decrees". *Parker* v. *United States*, 126 F. 2d 370, 378-379, 135 F. 2d 54, 58 (C.A. 1), certiorari denied, 320 U.S. 737. If such conduct is beyond the reach of the contempt powers of the court of appeals, it would seem that when the Board obtained enforcement of its original back pay order it "won a lawsuit and lost a cause" (*International Salt Co.* v. *United States*, 332 U.S. 392, 401).

Inability to pay may, in appropriate circumstances, excuse non-compliance with a court order. *Maggio* v. *Zeitz*, 333 U.S. 56, 69. Our view of the enforcement decree does not mean, as respondents assert (Br. in Op. 16-17), that the employer must freeze assets in order to be able to meet his obligation and that he is precluded from taking ordinary business risks which might affect ability to pay. Our point is simple: that inability to comply with a decree when one has purposefully caused the inability (as alleged to be the case here) in order to evade the duty of compliance cannot be a defense. When "the inability [to pay] is wilfully brought about by [the] defendant himself, with intent to avoid payment, the refusal to pay becomes contumacious, and the inability so resulting will not purge the defendant of contempt." *Staples* v. *Staples*, 87 Wis. 592, 596, 58 N.W. 1036-1037. See cases collected in Anno., 120 A.L.R. 703. For it is a matter of "common sense and common justice that, where the contemnor creates the inability * * * he rather aggra-

vates than extenuates his offense." *Clay* v. *Waters*, 178 Fed. 396, 399 (W.D. Mo.), affirmed, 178 Fed. 385 (C.A. 8).

Indeed, the principle has been applied in situations where no order whatever had been entered. Thus, it has been held that the diversion or destruction of property or funds for the purpose of defeating a decree or judgment which a court may ultimately make concerning the ownership and disposition of such property or funds constitutes contempt. The reason is, of course, that "a final decree would be idle and nugatory if pending the litigation [the party in question] should be held at liberty to put the fund beyond the reach of the process of the court." *Merrimack River Savings Bank* v. *Clay Center*, 219 U.S. 527, 536. And see *Lamb* v. *Cramer*, 285 U.S. 217, 219-220.[1]

What is true of contempt proceedings in cases in which no judgment or decree has yet been entered certainly applies with greater force to a remedial civil contempt proceeding predicated upon a decree which determines liability and prescribes relief. As the court below itself pointed out (R. 83), Deena Artware "knew, that it would be later ordered by the Court to make certain specific payments * * *."

The serious consequences which flow from the ruling

[1] See, also, 2 Daniell, *Chancery Pleading and Practice*, pp. 1684-1685 (4th Amer. Ed. 1871); *Clay* v. *Waters*, 178 Fed. at 388, 398-399; *Wartman* v. *Wartman*, 29 Fed. Cas. 303, 305 (No. 17,210); *United States* v. *Shipp*, 203 U.S. 563, 575; *Richard* v. *Von Mohr*, 20 Fed. Cas. 682 (No. 11,763); *Ex parte Kellogg*, 64 Cal. 343, 344, 30 Pac. 1030, 1031; *Gallard* v. *Gallard*, 11 Cal. 475, 478, 13 Am. Rep. 167; *State* v. *District Court*, 37 Mont. 185, 188, 97 Pac. 811, 812; *Mace* v. *Trimble*, 3 E. D. Smith (N.Y.) 607; *Fowler* v. *Fowler*, 6 Okla. 280, 284-286, 161 Pac. 227, 230-231; Daniell, *Chancery* (1939), p. 175, § 393.

of the court below serve to refute it. As this Court has noted, the remedy of back pay is one of the most important sanctions for effectuating the policies of the Act. *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U.S. 177, 197. The effectuation of these policies is as much the business of a reviewing court as of the Board. *National Labor Relations Board* v. *Bradford Dyeing Association*, 310 U.S. 318, 342-343; *National Labor Relations Board* v. *Warren Co.*, 350 U.S. 107, 112. A court decree, like the Board order it enforces, is aimed at the prevention of unfair labor practices, and to the extent that compliance is frustrated, that objective is thwarted. "It is for this reason that Congress gave the judicial remedy of contempt as the ultimate sanction to secure compliance with Board orders." *Warren Co.*, *supra*, 350 U.S. at 112-113.

The refusal of the court below to apply contempt sanctions against respondents threatens the scheme of enforcement. As noted above, once an enforcement decree is entered directing the offending party to make the injured employees whole for loss of pay, there remains the task of computing the exact amounts due to the employee or employees, after appropriate set-off of amounts which were or might have been earned in other employment. This arithmetical computation often entails the resolution of numerous subsidiary issues. "The computation of the amount due may not be a simple matter. It may require, in addition to the projection of earnings which the employee would have enjoyed had he not been discharged and the computation of actual interim earnings, the determination whether the employee wilfully incurred losses, whether

the back pay period should be terminated because of offers of reinstatement or the withdrawal of the employee from the labor market, whether the employee received equivalent employment, and the like." *Nathanson, supra*, 344 U.S. at 29-30. The result is that frequently the determination of the specific amount of back pay due is a laborious and time-consuming task. There are bound to be substantial time lags (as there were here) between the entry of the enforcement decree, the computation of the specific amounts of back pay due, and the entry of a supplemental decree directing the payment of such sums.

If, as the court below has held, the enforcement decree imposes no enforceable duty, the offending party is free to take advantage of the unavoidable delay between the enforcement and supplemental decrees and to defeat the Board's back pay order by diverting its assets.[*] It is difficult to believe that such conduct—calculated as it is to frustrate what is perhaps the most potent remedy by which the Board can achieve the statutory objectives—is immune from contempt sanctions. Indeed, the court below itself, at an earlier stage of this litigation, acknowledged that such "improper actions" would constitute contempt. 207 F. 2d 798, 802.

It is no answer to suggest, as the opinion does (R. 82), that the "transactions complained of in the present case could have been attacked and possibly upset" under state procedures dealing with preferences or

[*] The seriousness of the ruling is aggravated by the fact that the court below is also of the view that the Board would not be entitled to an order restraining the dissipation of assets pending determination of the specific amounts of back pay due. 207 F. 2d 798, 801-802.

conveyances for the purpose of defrauding creditors." As Judge (now Mr. Justice) Stewart observed in this case in dissenting from an earlier ruling of the Court of Appeals denying the Board's application for an order of discovery, 251 F. 2d 183, 187-188:

> Even if the Board could properly now institute a trial court proceeding, the object of such a proceeding could only be the effectuation of the enforcement decree of this court. The effectuation of that decree is the proper business of this court alone. Whether or not the Board is called a judgment creditor of the respondent, any action taken in a trial court would stem solely from the enforcement decree of this court, whose function it is to retain jurisdiction to administer all necessary further relief * * *.

This Court, we submit, has made plain that the possibility of alternate procedures cannot serve to relieve the reviewing court of its responsibility to compel obedience to its decrees. Thus, it declared in *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 194-195, a case arising under the Fair Labor Standards Act:

> The direction of the court was that respondents make payments of wages to their employees pursuant to a prescribed formula. If the court is powerless to require the prescribed payments to be made, it has lost the most effective sanction for its decree and a premium has been placed on violations. The fact that another suit might be brought to collect the payments is, of course, immaterial. For the court need not sit supinely by waiting for some litigant to take the initiative. Vindication of its authority through enforcement

> of its decree does not depend on such whimsical or fortuitous circumstances. The fact that the Administrator is the complainant and that the back wages go to the employees is not material. It is the power of the court with which we are dealing—the power of the court to enforce compliance with the injunction which the Act authorizes, which the court has issued, and which respondents have long disobeyed.

Respondents, relying on this Court's decision in *Nathanson, supra*, intimate that the remedy of contempt is not available to the Board to compel payment of back pay awards ordered by a court decree because the Board merely acts "as agent for back-pay claimants" (Br. in Op. 14). In truth, *Nathanson* runs counter to the contention which respondents advance. In that case, the Court held that a back pay award was not entitled to priority in bankruptcy proceedings as a debt due to the United States, reasoning that the Board, in collecting the claims, acts as "agent for the injured employees." The Court nonetheless made it clear, in that very case, that a back pay order serves to vindicate the public policy of the statute; that the Board is the only party entitled to enforce the Act; and that, when enforcement of a Board order has been directed by a court of appeals, the "full sanction" of the Act "has therefore been placed behind the order." *Nathanson*, 344 U.S. at 27, 28.

The sanctions of the Act, as this Court has repeatedly held, include the sanction of contempt. The provision "conferring exclusive power upon the Board to prevent any unfair labor practice . . . necessarily em-

braces exclusive authority to institute proceedings for violation of the court's decree directing enforcement. The decree in no way alters, but confirms, the position of the Board as the enforcing authority. * * * If the decree of enforcement is disobeyed, the unfair labor practice is still not prevented. The Board still remains as the sole authority to secure that prevention. The appropriate procedure to that end is to ask the court to punish the violation of its decree as a contempt." *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U.S. 261, 269-270. And see *National Labor Relations Board* v. *Warren Co.*, *supra*, 350 U.S. at 112-113.

II

The Court Below Erred in Refusing to Permit Proof on the Board's Claim That Weiner, Products, and Products' Subsidiaries Were Alter Egos, Successors, and Assigns of Deena Artware and, Being Solvent, Were in Contempt of the Supplemental Decree for Their Failure and Refusal to Pay the Back Pay Awards

The alternate theory of the Board's petition was that, even if respondents are not answerable in contempt for their alleged misconduct during the period between entry of the enforcement and supplemental decrees, all respondents except Deena Artware (which was already insolvent at the time of the entry of the second decree) are nonetheless answerable for nonpayment of the sums directed to be paid by the supplemental decree. The theory was grounded, briefly, on allegations that Deena Artware and the other respondents were joined in a single enterprise; that the latter, as alter egos, successors, or agents of Deena Artware, were chargeable with the payment of the back pay

awards prescribed by the supplemental decree; and that, being solvent, they were guilty of contempt in failing and refusing to pay them. The court below does not appear to have specifically addressed itself to this branch of the Board's case. Possibly, it may have concluded, in line with its general ruling, that since the facts alleged to establish this relationship among the respondents antedated the supplemental decree, they were not cognizable for the purpose of establishing violation of that decree (R. 84). In any event, we submit that the court erred in refusing to allow proof on this theory of the case.

As pointed out above, the relevant back pay orders and decrees were made binding not only upon Deena Artware, but also upon its "officers, agents, successors, and assigns." This Court has dealt on several occasions with the scope and reach of such orders, both under the Act and under other comparable statutes. It summed up its views in *Regal Knitwear Co. v. National Labor Relations Board*, 324 U.S. 9, 14-15:

> The term "successors and assigns" in an enforcement order of course may not enlarge its scope beyond that defined by the Federal Rules of Civil Procedure. Successors and assigns may, however, be instrumentalities through which defendant seeks to evade an order or may come within the description of persons in active concert or participation with them in the violation of an injunction. If they are, by that fact they are brought within scope of contempt proceedings by the rules of civil procedure. We have indicated that Labor Board orders are binding upon such

cessors and assigns who operate as "merely a disguised continuance of the old employer." *Southport Petroleum Co.* v. *Labor Board*, 315 U.S. at 106. We have also said of an injunction to restrain violation of the Fair Labor Standards Act, which is somewhat analogous to Labor Board orders, that "Not only is such an injunction enforcible by contempt proceedings against the corporation, its agents and officers and those individuals associated with it in the conduct of its business, but it may also, in appropriate circumstances, be enforced against those to whom the business may have been transferred, whether as a means of evading the judgment or for other reasons." *Walling* v. *Reuter Co.*, 321 U.S. 671, 674. In both of these cases the reference is not merely to succession, but to a relation between the defendant and the successor which might of itself establish liability within the terms of Rule 65 [of the Rules of Civil Procedure].[6]

The relevant inquiry here is whether, on the allegations of the petition, the relationship between Deena Artware and the other respondents is such as to make the latter liable for the payment of the back pay awards. The answer, as this Court has indicated, depends "on an appraisal of [the] relations and behavior" of the parties in the particular case. *Regal*

[6] Rule 65(d) provides: "Every order granting an injunction and every restraining order * * * is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise."

Knitwear, supra, 324 U.S. at 15.[7] We turn therefore to the concrete situation presented here.

In the present posture of the case the Board's allegations must, of course, be taken as true. From those allegations there emerges the following pattern:

(1) Weiner is the real owner of Products and its affiliated subsidiaries, including Deena Artware, and he has directed and controlled their financial and business operations.

(2) Products and its affiliated subsidiaries, including Deena Artware, constitute and have been operated financially and otherwise as a single integrated enterprise engaged in the same business, with each corporation performing a particular function as a department or division of the enterprise.

(3) Weiner and Products caused Deena Artware to cease all operations and transfer its plant, equipment and business to Products and its other subsidiaries, which are now continuing that business without substantial change.

(4) Weiner, Products, and the affiliated subsidiaries have engaged in a systematic and progressive diversion of Deena Artware's funds and assets, throughout the course of the litigation with the Board, for the purpose of defeating any back pay awards.

---

[7] Obviously, one may appraise the relationships existing at the time that a decree is entered (as well as thereafter) in order to determine the identity of persons within its reach. The question "Who is subject to the decree?", is discrete from the question "What are the acts of contempt?". Respondents' arguments (see Br. in Op. 12), resting on the proposition that the alleged relationships between them antedated the supplemental decree—a proposition with which we can readily agree—confuse the two questions

In short, we have here an integrated enterprise, with common ownership and common control of its component units; affiliates who have taken over Deena Artware's business and assets and are no more than a "disguised continuance of the old employer" (*Southport Petroleum Co.* v. *National Labor Relations Board*, 315 U.S. 100, 106); and a diversion and transfer of assets from Deena Artware to the others for the purpose of "evading the judgment" (*Walling* v. *Reuter Co.*, 321 U.S. 671). The case thus presents, in our view, "appropriate circumstances" in which the obligation to compensate the employees for loss of wages may be enforced against respondents Weiner, Products and its subsidiaries. For the relationship of these respondents to Deena Artware compels the conclusion either that they, together with Deena Artware, constitute a single employer,[2] or that they have been "in active concert or participation" with Deena Artware in pursuing a plan of evasion.[3]

[2] Cf. *National Labor Relations Board* v. *Nettleton Co.*, 241 F. 2d 130, 131 (C.A. 2); *A. M. Andrews Co.* v. *National Labor Relations Board*, 236 F. 2d 41, 45 (C.A. 9); *National Labor Relations Board* v. *Concrete Haulers, Inc.*, 212 F. 2d 477, 478-479 (C.A. 5); *National Labor Relations Board* v. *Calcasieu Paper Co.*, 203 F. 2d 12, 13 (C.A. 5); *National Labor Relations Board* v. *Condenser Corp.*, 128 F. 2d 67, 70-72 (C.A. 3).

[3] Cf. *National Labor Relations Board* v. *Hopwood Retinning Co.*, 104 F. 2d 302, 304 (C.A. 2); *National Labor Relations Board* v. *Pagan*, 237 F. 2d 373, 375 (C.A. 4); *Dickey* v. *National Labor Relations Board*, 217 F. 2d 652, 653 (C.A. 6); *National Labor Relations Board* v. *Keiman Lumber Co.*, 203 F. 2d 194, 196 (C.A. 2); *National Labor Relations Board* v. *O'Keefe & Merritt Manufacturing Co.*, 178 F. 2d 445, 448-449 (C.A. 9); *National Labor Relations Board* v. *Fred P. Weissman Co.*, 170 F. 2d 952, 953-954 (C.A. 6), certiorari denied, 336 U.S. 972; *National Labor Relations Board* v. *Blair Quarries*, 152 F. 2d 25, 26 (C.A. 4); *National Labor Relations Board* v. *Adel Clay Co.*, 134 F. 2d 342, 346 (C.A. 8).

A different result is not indicated merely because the various component units of the integrated enterprise were organized as separate corporate entities. For where, as here, a subsidiary has been controlled and "used as a mere agency or instrumentality of the owning company," the courts will "not permit themselves to be blinded or deceived by mere forms * * * but, regardless of fictions will deal with the substance of the transaction involved as if the corporate agency did not exist and as the justice of the case may require." *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Minneapolis Civic and Commerce Assn.*, 247 U.S. 490, 501. Nor does it make any difference, as respondents intimate (Br. in Op. 12), that only Deena Artware was party to the original unfair labor practice proceedings and that the relevant orders and decrees run specifically against Deena Artware but do not refer to the other respondents by name.[10] For, as the Court observed in *Regal*, *supra*, 324 U.S. at 14, those identified with the party defendant, whether as alter egos or successors or assigns, are bound "although they were not parties to the original proceeding."

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[10] As earlier noted, all of the relevant orders and decrees do run to the "officers, agents, successors and assigns" of Deena Artware.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below should be reversed.

J. LEE RANKIN,
Solicitor General.

RALPH S. SPRITZER,
Assistant to the Solicitor General.

STUART ROTHMAN,
General Counsel,

THOMAS J. MCDERMOTT,
Associate General Counsel,

DOMINICK L. MANOLI,
Assistant General Counsel,

MARION L. GRIFFIN,
Attorney,
National Labor Relations Board.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1958.

No. [redacted] 46

NATIONAL LABOR RELATIONS BOARD, Petitioner,

versus

DEENA ARTWARE, INCORPORATED, ET AL., Respondent.

BRIEF FOR RESPONDENT.

JAMES G. WHEELER,
of WHEELER & MARSHALL,
901-6 Citizens Bank & Tr. Bldg.,
Paducah, Kentucky,

MERVIN N. BACHMAN,
of ARVEY, HODES & MANTYNBAND,
One North LaSalle Street,
Chicago, Illinois,
Attorneys for Respondent.

THOMAS J. MARSHALL, JR.,
of WHEELER & MARSHALL,
901-6 Citizens Bank & Tr. Bldg.,
Paducah, Kentucky,

SIDNEY R. ZATZ,
of ARVEY, HODES & MANTYNBAND,
One North LaSalle Street,
Chicago, Illinois,
Of Counsel.

WESTERFIELD BONTE CO. INCORPORATED LOUISVILLE KY.

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(a) No Respondent Is in Contempt of the July 30, 1952 Decree Because It Did Not Fix Any Definite Amount To Be Paid.

(b) No Respondent Is in Contempt of the December 16, 1955 Decree, Even if Artware's Insolvency Resulted From Alleged Preferential Transfers of Its Assets to Other Respondents Because the Transfers Occurred *Prior* to that Decree 14

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IN THE

Supreme Court of the United States

October Term, 1958.

No. 790

NATIONAL LABOR RELATIONS BOARD, - *Petitioner,*

v.

DELNA ARTWARE, INCORPORATED, ET AL., *Respondent.*

BRIEF FOR RESPONDENT.

QUESTIONS PRESENTED.

1. Whether any respondent can be deemed in contempt of the decree of July 30, 1952, since that decree did not fix any amounts due the back pay claimants.

2. Whether any respondent can be deemed in contempt of the December 16, 1955 decree which fixed the sums due, where Artware became insolvent *prior* to that decree, and it is alleged that its insolvency was caused by other respondents diverting Artware's assets to themselves *prior* to the decree to avoid payment of the ultimately liquidated claims.

3. Whether the respondents (other than Artware), who were not parties to the proceedings when the respective decrees were entered, may be subject to contempt for failure to pay the amount assessed against Artware.

4. Whether the Board's allegations that respondents are alter egos, successors and assigns of Artware are sufficient, within the requirements of Rule 65(d) of the Federal Rules of Civil Procedure, to establish liability of any respondents in contempt of either decree.

STATEMENT.

Deena Artware was organized as a Kentucky corporation in January, 1946. Its capital stock, consisting of 800 shares, had no par value. It was recited in the Articles that the stock was owned as follows: Marliss Manufacturing Company, an Illinois corporation, 391 shares; George H. Weiner, 3 shares; Dorothy Weiner, 3 shares; Edward Brill, 3 shares. The incorporators were Melvin A. Garretson, Irvin Coppel and Jean Levich.

The corporation acquired a small pottery plant in Paducah, Kentucky, the operation of which had not been successful prior to that time. It paid for this plant $65,000.00. Weiner never owned more than three shares of its stock. Deena Products Company acquired and still holds a majority of the shares issued and outstanding. The pottery plant was located on a lot at Third and Ohio Streets in Paducah, Kentucky, fronting 115 feet, 6 inches on Third Street. In the rear of this building and separated from it by an alley and the tracks of a railroad, was a lot owned by the corporation, approximately 300′ x 123′.

Deena Artware entered into a contract for the construction at a cost of approximately $83,000.00 of a

plant or addition to its plant on the vacant property above referred to. Its purpose was to equip the new plant so that the lamp bases made in the pottery could be finished in the new plant and turned out as a finished product.

During the early part of the year 1948 a Labor Board election was conducted at the plant and the United Brick and Clay Workers of America was selected as the representative of the employees. During negotiations between the employer and a committee of the Union, an engagement was made for a meeting of both sides with a conciliator in the employ of the United States Government. The meeting was to be held on Wednesday in the offices of the company's attorney. The conciliator found it necessary to postpone the meeting until the following Friday. He attempted to notify all the parties but for some reason his notice of postponement failed to reach Earl Bellew, an officer of the Union. Mr. Bellew appeared on Wednesday with the Union committee at the place fixed for the meeting with the conciliator.

When he learned that the meeting had been postponed, he discussed the situation with his committee and determined to call a strike. The strike began that afternoon. The plant continued to operate with employees who remained at work. The familiar pattern of picketing, name-calling, violence and other disorders followed, and the picket line was shortly thereafter extended from the entrances to the operating plant so as to include all of the property on which the construction work was in progress. There was no dispute

involving the contractors during the construction work or their employees. Nevertheless, the picket line forced a discontinuance of the construction work.

Deena Products v. United Brick & Clay Workers, *et al.*, 195 F. 2d 612.

Two actions were filed against United Brick and Clay Workers, one by Deena Products Company, an Illinois corporation, which we will refer to as the parent company, and the other by Deena Artware, a subsidiary corporation. The Court directed a verdict against Deena Products Company, holding in substance that there *was no contractual relation between Deena Products Company and Deena Artware* which would enable the parent company to recover damages for the wrongful secondary boycott which stopped the construction of the plant by its subsidiary. On appeal the District Court was affirmed. The Court of Appeals stated in its opinion that the right of the parent company to recover depended entirely upon contractual relations with the subsidiary and such contractual relations did not exist. 195 F. 2d 613.

The record in the above case was brought up to this Court which denied certiorari (344 U. S. 822, 73 S. Ct. 21), No. 117 in the October term, 1952. References to pages of the Transcript, and particularly to the extensive examination and cross-examination of George Weiner and independent auditor Harry Appleman, are found in our motion and answer in the Court below (R., p. 28). The extensive examination of these witnesses largely deals with the relationship between the

parent company, Deena Products, herein called Products; and Deena Artware, herein called Artware, and the disposition of construction material which, on account of a secondary boycott, could not be used by Artware and was used in a new building in the nearby town of Arlington, Kentucky. The testimony also shows that material used at Arlington was charged to Deena of Arlington, herein called Arlington, and not to Artware.

Income tax returns were produced on that trial, as the record shows, and they show that Products was not permitted to deduct on its tax return the loss on account of construction costs. The loss was permitted for Artware. Thus, the Bureau of Internal Revenue reached the same conclusion arrived at by the District Court and affirmed by the Court of Appeals as to the relationship between the parent and the subsidiary, Artware.

United Brick and Clay Workers v. Deena Artware, 198 F. 2d 637.

In the above case the Court affirmed a judgment in the amount of approximately $30,000.00 in favor of Deena Artware and against the Clay Workers Union and the American Federation of Labor. The judgment was based on a finding that there had been a wrongful secondary boycott which stopped the construction of the plant in Paducah. The first trial resulted in a hung jury. The cross-examination of Weiner and the auditor, Harry Appleman, showed that certain building material and construction plans originally designed

to be used by Artware had actually been used by the new corporation, Arlington, organized after the secondary boycott had made it impossible to continue the construction at Paducah. See amended and substituted complaint (R., p. 85). The judgment obtained on this complaint (R., p. 91), represented the net loss to Artware on account of the construction costs.

The thorough exploration of the relationship between Products and Artware and the development of facts as to the use of and charge for building material which could not be used by Artware and was used by Arlington are available to the Board in the records on appeal in both of the above cases. "Discovery" is not needed and it is not the true purpose of the motions of the Board. Attorneys for the defendants, United Brick & Clay Workers Union and American Federation of Labor, in the secondary boycott case in which judgment was obtained were Messrs. Woll and Thatcher of Washington, D. C., a Mr. Tobin of Washington, John Young Brown and Joseph S. Freeland of Kentucky, and Nathan Duff of New Jersey, also an official of the union. Messrs. Duff and Freeland were also active in assisting the Board in the unfair labor practice case, and it is certain that in its thorough preparation of its numerous motions, the Board has familiarized itself completely with the facts brought out in these records.

The judgment in favor of Deena Artware for damages resulting from the secondary boycott and the order of the Board based upon its conclusion that there was no secondary boycott were both affirmed.

N. L. R. B. v. *Deena Artware*, 198 F. 2d 645, July 30, 1952. The above case is referred to as the first decree.

Deena of Arlington was organized to carry on a business which would suffer or be destroyed if customers could not be supplied with merchandise. It also minimized respondent's loss by using material which had been purchased and delivered to Paducah but which could not be used there on account of the wrongful secondary boycott. The loss was also minimized to some degree by the purchase for $25,000.00 of a small plant of Sippi Products at Wickliffe, Kentucky. This dispersal of operations, one of the things of which the Board complains, was precipitated and made necessary by the wrongful act of the Unions, viz., the secondary boycott of the construction work.

In 1949 Artware executed to Products its written promissory note for approximately $75,000.00. The note and mortgage may be found on pages 172, *et seq.*, of the record in the Deena Products case referred to above (R., p. 21). The execution was duly authorized by action of the board of directors of the respective companies (R., p. 22). When the indebtedness matured five years after the execution of the note and mortgage, Artware conveyed the mortgaged property to Products in satisfaction of the indebtedness. At that time the indebtedness of Artware to Products amounted to approximately $161,000.00. The property conveyed in satisfaction of the indebtedness had been appraised at approximately $85,000.00 (R., p. 29). It will be remembered that this property had originally been purchased in 1946 for $65,000.00. Another appraisal was

made when Industrial Realty Company acquired the property in 1954. The real estate was then appraised at $85,487.50, and the personal property at $5,253.00 (R., p. 23).

N. L. R. B. v. Deena Artware, 207 F. 2d 798.

In this case the Board attempted to restrain the respondent from assigning funds to the parent corporation in partial satisfaction of its indebtedness to that corporation. The assignment referred to was as follows:

"ASSIGNMENT.

"WHEREAS, Deena Artware, Inc., is indebted to Deena Products Company in sums largely in excess of any amounts for which it has recovered judgment against United Brick & Clay Workers of America and the American Federation of Labor.

"AND WHEREAS, a mortgage heretofore executed by Deena Artware, Inc., may be insufficient to secure the amount of its indebtedness to Deena Products Company,

"AND WHEREAS, Deena Artware, Inc., has assigned out of the said judgment to Wheeler & Marshall, Attorneys, the sum of Fifteen Thousand Dollars ($15,000.00),

"NOW, THEREFORE, IN CONSIDERATION OF THE FOREGOING, and in order to secure Deena Products Company, on account of the indebtedness of Deena Artware, Inc., to it, Deena Artware hereby assigns to Deena Products Company any balance due it out of said judgment after the payment of the amount assigned to Wheeler & Marshall.

"IN TESTIMONY WHEREOF, witness the hand of said Deena Artware, Inc., by its duly authorized officers, this 16th day of December, 1952.

DEENA ARTWARE, INC.
By (s) Geo H. Weiner
President

ATTEST:
(s) J. C. Jarett
Secretary"

The Board not only sought to enjoin the assignment *but asked for an order to show cause why Dee Artware*, Deena Products Company and the President of both corporations, George H. Weiner, should not be required to produce books and records in order that the Board might determine whether Artware was being operated for the purpose of rendering it without funds to pay back-pay obligations. The amount of back-pay obligations had not then been determined. The Court was of the opinion that it should not take jurisdiction of the matter. It pointed out that the claims were not lien claims and that if there was an improper transfer of assets from the subsidiary to the parent corporations, *remedies were available to the Board in the District Court independent of any action by the Court of Appeals.* The Court pointed out that the questions involved in a controversy between creditors would be both factual and legal and that the *Board should avail itself of the facilities of a trial court.* Many cases were cited supporting the Court's ruling, page 801. It was stated in that opinion that a statement of probable financial inability to pay claims did not amount

to contempt, page 802, and further that the contempt power of the Court should be exercised with caution, page 802. Affidavits and counter-affidavits were filed, bearing to some extent on the question submitted here. For example, the affidavit of Bernice Kessler, secretary of Deena Artware, showed by certified copies that the board of directors had authorized the execution of the notes and mortgages to Deena Products Company. The affidavit of the independent auditor, Appleman, indicated that the indebtedness of Artware to Products at that time was approximately $161,000.00.

There has never been any attack on the execution of the mortgages or the conveyance of real and personal property in satisfaction of the indebtedness secured by the mortgage. In all of the arguments beginning in the 1953 case dealing with the assignment the Court below suggested that the Board might use the facilities of a trial court if it felt that one creditor was fraudulently obtaining an advantage over another. *N. L. R. B.* v. *Deena Artware*, 207 F. 2d 799, see page 801; *N. L. R. B.* v. *Deena Artware*, 251 F. 2d 183, see page 186. The conveyance more than a year before the final decree of Artware's property in satisfaction of mortgages executed more than six years before the final decree could not be complained of as "siphoning off" assets.

The questions presented in the assignment case were almost identical with those which have been repeatedly presented in the subsequent four cases. (We refer to them as separate cases, though actually they are all No. 11,156.) The validity of the assignment was liti-

gated and no review of the 1953 ruling was sought by the Board. Surely the Board is not now in a position to seek a review of a decision made in that case six years ago and more than two years before the final decree. This illustrates the soundness of the reasoning on which the last opinion of the Court below is based, namely, that there can be no contempt of a decree until a decree is definite and certain.

N. L. R. B. v. Deena Artware, 228 F. 2d 871.

This was the proceeding to enforce the Board's final award amounting to approximately $300,000.00 in favor of certain former employees of the respondent. The questions as to the Board's findings need not be outlined here. The Court found that the findings were supported by substantial evidence. The decree was entered December 16, 1955.

N. L. R. B. v. Deena Artware, 251 F. 2d 183.

This was a proceeding instituted by the Board to obtain an order requiring the respondent Deena Artware and the several affiliated corporations to produce their books and records, permit the Board to inspect, copy and photograph them, and to require present or former officers of the respondent and affiliated corporations to give depositions. The facts as to the relationship between the corporations, the strike and the litigation arising out of it were reviewed in the motion and response. The Court was urged to treat the motion as a proceeding for contempt. The Court referred

to its ruling in the 1953 assignment case, stating that the issues raised were not materially different from those raised in the 1953 case, practically the only difference being that the amount of back pay claims had in the meantime been liquidated. *It was pointed out that it was not customary for an appellate court to retain jurisdiction in order to collect its judgment.*

It will be noted that all of the above cases except the first two referred to are in this action, No. 11,156, and we think the records and affidavits are material and can be considered by the Court below.

N. L. R. B. v. Deena Artware, 261 F. 2d 503, Dec. 13, 1958 (R., p. 74).

The opinion of the Court below by Judge Miller, who had this controversy before him for the seventh time and who had written all of the opinions except two which were *per curiam*, sets out some history of the litigation and refers to previous opinions, stating that they "give in detail the factual background and history of the litigation." In this thorough opinion a unanimous Court held that it was not contempt of court to refuse to obey the Board's order before it was judicially confirmed and that the enforcement decision of July 30, 1952, which fixed no amount of back pay due, was not sufficiently definite to serve as a basis of contempt proceedings. Incidentally, it was suggested in the earlier opinions that the amount of back pay might be as much as $100,000.00. Actually, it amounted to approximately $300,000.00. Finding that all of the transactions relied upon by the Board as a basis for

contempt proceedings occurred prior to December 16, 1955, the date of the final decree, the Court denied the Board's motion.

SUMMARY OF ARGUMENT.

1. No respondent can be in contempt of a decree which does not specify definitely what he is to do. The decree of July 30, 1952 merely established liability for an unliquidated amount, if indeed for any amount, and did not fix any specific sums due.

2. No respondent can be in contempt of a definitive decree ordering him to pay money if, prior to such a decree, he becomes insolvent. The same is true even though his insolvency was caused by alleged preferential conveyances *prior* to the decree.

3. The allegations which seek to impose liability in contempt upon the theory that some of the respondents are alter egos, officers, agents, successors and assigns of Artware are not legally sufficient within the meaning of Rule 65(d) of the Federal Rules of Civil Procedure.

4. The Board, as agent for back-pay claimants, may seek to reach assets allegedly conveyed preferentially by Artware, but contempt proceedings cannot be maintained in such circumstances. The proper procedure is a creditor's action to set aside conveyances and reach debtor's assets.

ARGUMENT.

I.

(a) No Respondent Is in Contempt of the July 30, 1952 Decree Because It Did Not Fix Any Definite Amount To Be Paid.

(b) No Respondent Is in Contempt of the December 16, 1955 Decree, Even If Artware's Insolvency Resulted From Alleged Preferential Transfers of Its Assets to Other Respondents Because the Transfers Occurred *Prior* to That Decree.

All the transactions alleged by the Board to constitute contempt antedated the decree of December 16, 1955, which, for the first time, liquidated the back pay claims, and consequently, was the only decree anyone could have disobeyed contumaciously. Nothing subsequent to that decree, however, was alleged by the Board and the court below properly dismissed its contempt petition and motions for discovery, inspection and depositions. The court below cited *National Labor Relations Board* v. *New York Merchandise Co.*, 134 F. 2d 949, 952 (C.A. 2), where Judge Learned Hand held that,

> "until such a hearing has been had and a decision rendered fixing the amount, the employer cannot be guilty of contempt, because it is cardinal in that subject that no one shall be punished for the disobedience of an order which does not definitely prescribe what he is to do. *McFarland* v. *United States*, 7 Cir., 295 F. 648, 650; In re *Olson*, 2 Cir., 79 F. 2d 253; *National Labor Relations Board* v.

Bell Oil & Gas Co., 5 Cir., 99 F. 2d 56; *Berry* v. *Midtown Service Corp.*, 2 Cir., 104 F. 2d 107, 111, 122 A. L. R. 1341. So far as an enforcement order directs back pay to discharged employees it cannot therefore be interpreted as peremptory in the sense that will support a proceeding to punish for contempt. *Pro tanto* it is interlocutory, though it is final as to any of its other provisions that require no further definition. We cannot delegate to the Board power to fill in the amount of the back pay as a merely ministerial duty."

The Board now contends that the respondents, nevertheless, must be found in contempt on its allegations that Artware's assets were diverted by the parent corporation to itself to avoid payment of the sums ultimately found due by the decree of December 16, 1955. It argues that the July 30, 1952 decree, although it contained no order to pay any definite sums to any named individuals and although no ultimate liability might ever have been found, nevertheless created "a fixed and immediate obligation" upon Artware and "others identified with it" to "make payment of whatever specific sums may ultimately be found due". (Br., pp. 14, 20). In support of its view the Board refers to cases in which respondents have sought to avoid compliance with court decrees by fraudulent conveyances, and by destroying or diverting identifiable property or funds which were the subject matter of the litigation. However, in the cases urged by the Board to support the contention that fraudulent conveyances designed for the purpose of escaping obligations under court decrees constituted contempt, the decrees found to have

been violated were definite and certain, and precisely fixed the obligation of the respondent and were wholly unlike the July 30, 1952 decree here. The cases involving destruction and diversion of property and funds, *as constituting contempt, even in the absence of an order,* rest upon the premise that the property or the fund was clearly identifiable as the subject matter of the pending litigation, such as a parcel of real estate described by deed, identified personal property, a fixed sum of money, or were in the custody of the court. Here the decree of July 30, 1952 described no such identifiable or fixed and certain subject matter, and no such property or fund was in the custody of the court below. Thus the fact that no final order had been issued in those cases is not decisive here. On the contrary, the contempt lay in those cases in the wilful dissipation or destruction of the clearly identified subject matter of the requested injunction. The cases relied upon by the Board (Br., pp. 21, 22 and footnote 1), consequently, are wholly inapposite.

In *Berry* v. *Midtown Service Corp.*, 104 F. 2d 107, cert. dismissed (by stipulation of counsel), 308 U. S. 629, a case cited in the opinion below which we believe is particularly pertinent here, the Court of Appeals for the Second Circuit held that a fraudulent conveyance prior to the entry of judgment was not a contempt of the judgment and observed that no one had ever claimed it to be. That court went on to state that issues arising from allegations of fraudulent conveyance prior to the entry of judgment were properly triable in a plenary suit to set aside such conveyances and to

reach assets. It should be noted that the court below pointed out to the Board that its allegations in the instant matter were triable by such plenary procedure. The Board, however, has not heeded that instruction.

In reality, the Board appears here as collection agent for the back pay claimants. It seeks to invoke the contempt jurisdiction of the court below to aid its collection of debts due its principals. This Court in *Nathanson* v. *National Labor Relations Board*, 344 U. S. 25, where the Board sought priority, as debts due the United States, for back pay claims in a bankruptcy proceeding, so described the status of the Board, and further characterized back pay claims as claims in contract against the debtor's estate. This Court's decision in the *Nathanson* case is a square holding that the public policy of the National Labor Relations Act does not require exceptional and extraordinary remedies when the Board seeks to collect back pay claims but that, on the contrary, that public policy is effectuated by recognizing the claims as debts in contract. It follows that the Board must pursue traditional procedures and remedies established to collect such claims. This would appear all the more so when, as here, the Board is seeking the extreme sanction of contempt in a case where the court below found that its decree had not been disobeyed by any respondent. In view of this Court's decision in the *Nathanson* case, the opinion of the court in the *Berry* case is a complete answer to the Board in this respect.

It aids nothing to the resolution of the issues in the present case to argue, as the Board does, that the "full

sanction" of the Act must be directed to carry out the court's decree. No one will dispute, that, in appropriate circumstances, proper effectuation of the policies of the Act may require the use of the contempt process. Before that extraordinary jurisdiction can be invoked, however, a Court of Appeals must find that its decree has been disobeyed. The discretion of the Court of Appeals is not abused when, in the absence of a finding that its decree has been violated, it denies access to its contempt jurisdiction. Nothing in *National Labor Relations Board* v. *Warren Co.*, 350 U. S. 107, contradicts that basic principle. The order in the *Warren* case was clear and definitive—it commanded the employer to bargain with a certified union. The employer disobeyed the decree and refused to bargain with the union, arguing that the certified union had lost its majority. The court below there excused the employer. This Court held that contempt should have been ordered because the employer disobeyed a specific command to bargain with the certified union and that its excuse had long been held no basis for avoiding the duty to bargain in the circumstances. Nor does the decision of this Court in *McComb* v. *Jacksonville Paper Co.*, 336 U. S. 187, support the result urged by the Board. In that case, again, the conduct found contumacious by the sole respondent and not a third party *followed* the entry of a *definitive* decree which contained a fixed and specific formula for payment of overtime wages due under the Fair Labor Standards Act. This Court's observations in that case concerning the availability of other tribunals as constituting no suf-

stitute for contempt procedures consequently were not made in a factual context comparable to that of the instant case where the acts alleged as contumacious occurred *prior* to the issuance of a definitive decree.

It is difficult to understand why the enforcement procedures of the Act are threatened, as the Board claims, by the decision below. Certainly the Board, as administrator of the Act, must pursue its remedy by appropriate procedures and in proper tribunals where, if properly sufficient allegations are proved, its claims may be properly adjudicated. This would appear especially so when, as here, the court below has pointed out to the Board the manner in which it should proceed.

II.

The Allegations Concerning the Relationship of the Other Respondents to Artware (the Only Party to the Proceeding) Do Not Meet the Test of Legal Sufficiency Within the Meaning of Rule 65(d) of the Federal Rules of Civil Procedure as to Warrant Liability in Contempt.

We believe that a fair appraisal of the Board's factual allegations will not support the conclusion that any respondents can be in contempt of any decree within the scope of Rule 65(d). Briefly, those allegations claim that an integrated enterprise existed which was owned and controlled by respondent Weiner and the parent corporation, Products, and that the assets of the subsidiary, respondent Artware, were "siphoned off" by Weiner and Products to escape payment of back pay claims. Upon analysis, the allegations fall into

two separate categories, one dealing with the corporate structure and relationship of the respondents and the other with the transactions which resulted in Artware's insolvency prior to the December 16, 1955 decree, and which, except for the actual conveyance of Artware's assets, occurred long prior to the July 30, 1952 decree.[1] Those dealing with the relationship of the corporate respondents demonstrate a common method of conducting corporate business. Parent stock ownership and parent control of subsidiaries is usual, not extraordinary. It is basic that they do not expose separate corporate entities to liability for the obligations of each other. Judge Learned Hand observed in *Kingston Dry Dock Co.* v. *Lake Champlain Transp. Co.*, 31 F. 2d 265 at 267 that,

> "So long as the law allows associated groups to maintain an independent entity, its sanction is not so easily evaded; the persons dealing with either [parent or subsidiary] do so upon the faith of the undertaking of that one which they may select."

Stripped of characterizations and inferences, the recitations in the Board's petition, summarized in its brief (Br., pp. 7-9), disclose the establishment of a subsidiary, Deena Artware, by its parent, Deena Products, to manufacture urns for lamp bases, that Products owned all the stock of Artware, that Products controlled the operations of Artware, that Products charged Artware for amounts advanced by Products

[1]The 5 year note and mortgage for $75,459.65 were executed on October 31, 1949, almost three years before the unliquidated decree of June 30, 1952 and a little over six years prior to the operative decree for contempt purposes, the December 16, 1955 decree.

for construction of a new plant to utilize Artware's production, that the new plan was abandoned and that Products cancelled the indebtedness of Artware by causing Artware to convey its assets to Products to satisfy the indebtedness. These allegations disclosed no sinister significance except as they are embellished by assertions of bad faith by the Board. Fair appraisal of the facts alleged show the history of an attempt to conduct an operation of mutual interest to the subsidiary and the parent, an attempt to make it successful by the construction of an adjoining plant, a failure to accomplish this objective, and a proper charge by the parent to the subsidiary for costs involved in the venture. Such allegations are no basis for concluding that the basic principle of corporate immunity referred to by Judge Hand should be disregarded.

That the policy of preserving the principle of corporate immunity in such circumstances is not lightly treated is demonstrated by the same court of appeals which rejected a Labor Board request for enforcement of its order against a parent corporation as successor in the absence of a *finding* that the parent so used its position as to wrong someone involved in the proceeding. In *National Labor Relations Board* v. *Timken Silent Automatic Co.*, 114 F. 2d 449, the court found insufficient "ground for disregarding the corporate existence of the two [parent and subsidiary] facts which showed a wholly owned subsidiary whose labor policies were dictated by the parent which controlled and dominated its subsidiary's affairs, conveyed all its subsidiary's assets to itself and assumed all the sub-

sidiary's obligations with notice of the proceedings before the Board but before any decree of the court. What the court found lacking, however, was a *factual* showing from which it might be said that "control by the parent—wronged or defrauded anyone with whom these proceedings are concerned and without proof of that sort of dominance the parent stockholder is not to be treated as one with the subsidiary corporation. *Finley* v. *Union Joint Stock Land Bank*, 281 Mich. 214, 274 N. W. 768; *Gledhill* v. *Fisher & Co.*, 272 Mich. 353, 262 N. W. 371, 102 A. L. R. 1042; *Kingston Dry Dock Co.* v. *Lake Champlain Transportation Co.*, 2 Cir., 31 F. 2d 265."

Although in the present case we take, as true, for the purpose of testing the legal sufficiency of the Board's petition, its factual allegations, we are not bound by its characterizations and inferences. The allegations charging bad faith or fraud in connection with the transactions between respondents prior to the decree of December 16, 1955 are conclusionary and not factual and would be demurrable. No facts are alleged showing that the value of the property received by Products in satisfaction of Artware's indebtedness exceeded that indebtedness. The Board merely has recited certain innocuous facts and attached labels of its preference to them. No rule of construction will sustain a pleading which depends, for its sufficiency in law, upon conclusions of the pleader. If, therefore, the allegations of bad faith are disregarded, and we believe they must be because they are conclusions, the the essential element—use of the parent's position t

wrong someone—is missing here, and no basis exists for infringing upon the separate and independent corporate immunities of these respondents.

Moreover, in *National Labor Relations Board* v. *Blackstone Mfg. Co.*, 123 F. 2d 633, Judge Learned Hand stated, in an opinion particularly opposite here that,

> "In allowing these words [successors and assigns] to stand we wish to make it clear however, that we do not hold that a 'successor' or an 'assign' will be in contempt of our order if it should (even after notice of the order, but without participating with the respondent in any disobedience by it) do exactly those things which the order forbids."

The court there was referring to the principle of the common law embodied in Rule 65(d) of the Federal Rules of Civil Procedure, which we believe this Court recognized in its decision in *Regal Knitwear Company* v. *National Labor Relations Board*, 324 U. S. 9. Thus, if respondent corporation Artware is not in contempt of any decree because of its inability to pay, even if caused by alleged preferential conveyance of its assets *prior* to the December 16, 1955 decree, then the alleged successors cannot be in contempt of any decree, because they did not participate in *any* disobedience of *any* order of the Court. Nor is this conclusion to be avoided, as the Board chooses, by remarking on alleged differences in the relationship of the respondents before and after that decree (Br., p. 39, footnote 7). The plain fact is that because there was

no contempt of any decree by Artware, the respondent against whom the Board chose to proceed, there was nothing for the alleged successors to participate in disobeying. Clearly, this is the reason the court below dismissed the Board's petition and motions as against *all* respondents.

This Court in *Regal Knitwear Company* v. *National Labor Relations Board*, 324 U. S. 9, held that liability in contempt as a successor or an assign would depend upon a concrete showing, after judicial hearing, that the relationship of the parties was such as to bring them within the meaning and scope of Rule 65(d) of the Federal Rules of Civil Procedure. That rule imposes liability in contempt only on the parties to the action, their officers, agents, servants, employees and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise. The scope of the rule is defined in the quotation from Judge Hand's decision in the *Blackstone* case and provides the test of liability in the instant matter.[2]

The relationship of the parties here, taking again as true only the Board's *factual* allegations, demonstrates, as we have shown above, a corporate structure and transactions by its constituent entities neither

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Weiner and the other respondents cannot be held in contempt of any decree as officer, agent, servant or employee of Artware within the meaning of the rule if Artware is not in contempt. It should be noted that, alternately, the Board seeks to impose liability upon Weiner and the respondents other than Artware upon the basis of the last clause of the rule, as "persons in active concert or participation with them [the actual parties] who receive actual notice of the order . . ."

wronging nor defrauding anyone involved in these proceedings and no participation by the parent and other affiliates with Artware in disobedience of any decree. Consequently, since liability in contempt as a successor or an assign under Rule 65(d) of the Federal Rules of Civil Procedure must depend upon either a showing of dominance or control utilized by the parent in its dealings with the subsidiary *to wrong or defraud* someone involved in the proceeding, or participation by the parent in disobedience of the decree by the subsidiary, there nowhere appears in the *factual* allegations of the Board petition any basis for such liability. No hearing is necessary to establish any concrete set of facts in the context of the requirements of Rule 65(d) because the factual allegations of the Board, if proved, would not sustain a finding of liability in contempt as regards any respondent.

It should be noted that the Board's position in insisting on contempt proceedings here has the necessary effect of creating the distinct possibility that a gross inequity may be perpetrated upon these respondents. In proceeding by contempt, the Board seeks to impose a liability upon all respondents of $300,000 (the sum fixed against Artware only in the supplemental decree of December 16, 1955). The Board's allegations claim a transfer of assets by Artware to the parent of $105,000. The Board asks that the parent be held liable for three times the amount it allegedly received from the subsidiary. However, it is basic that one who receives property in fraud of the grantor's creditors is liable only for what he receives from the grantor.

See, *Hamilton National Bank v. Halsted*, 31 N. E. 900, 134 N. Y. 520; and see 37 *C. J. S.*, page 1115, note 69. We believe that this possibility demonstrates, in a highly practical manner, that the proper procedure which the Board must follow to resolve its claims is by creditor's suit to reach assets in whatever tribunal is appropriate for that purpose if obvious injustice is to be avoided.

We have adverted to the instructions of the court below to the Board that it take its complaint to a tribunal in which the customary procedures for trial of creditors' suits are available. The Board has advanced no valid reason why it failed to attack the transactions complained of.

CONCLUSION.

In the light of the foregoing we submit that the judgment of the court below be affirmed.

JAMES G. WHEELER,
C of WHEELER & MARSHALL,
901-6 Citizens Bank & Tr. Bldg.,
Paducah, Kentucky,

MERVIN N. BACHMAN,
C of ARVEY, HODES & MANTYNBAND,
One North LaSalle Street,
Chicago, Illinois.

Attorneys for Respondent.

THOMAS J. MARSHALL, JR.,
C of WHEELER & MARSHALL,
901-6 Citizens Bank & Tr. Bldg.,
Paducah, Kentucky.

SIDNEY R. ZATZ,
C of ARVEY, HODES & MANTYNBAND,
One North LaSalle Street,
Chicago, Illinois.

Of Counsel.

SUPREME COURT OF THE UNITED STATES

No. 46.—October Term, 1959

National Labor Relations Board, Petitioner, v. Deena Artware, Inc., et al.	On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[February 23, 1960.]

Mr. Justice Douglas delivered the opinion of the Court.

This litigation has been long and drawn out and the present case is merely a small segment of it. In 1949 petitioner found that respondent Deena Artware, Inc. (Artware), had violated the National Labor Relations Act, 61 Stat. 136, 29 U. S. C. § 158 (a), by discharging and refusing to reinstate 66 employees who had engaged in a strike (86 N. L. R. B. 732, 95 N. L. R. B. 9); and it ordered Artware "and its officers, agents, successors, and assigns" to offer reinstatement to those employees and to make them whole for any loss of pay suffered by them as a result of the discriminating action. The Court of Appeals in 1952 affirmed the Board's decision with respect to 62 of the 66 employees and entered a decree enforcing the Board's order, 198 F. 2d 645, remanding the case to the Board to determine the amounts due the individual employees. In 1953 Artware offered reinstatement to all of these employees but shortly closed its plant (which was located in Kentucky), never resumed operations, and never paid any back pay to the employees in question.

It appears that Weiner, one of the respondents, created a series of corporations at the top of which was Deena Products, Inc., an Illinois corporation. Beneath it were a group of subsidiaries—formed under Kentucky law—Artware, Deena of Arlington, Inc., Sippi Products Co.,

Inc., and Industrial Realty Co., Inc.—all of whose shares, except for qualifying shares, were owned by Products. Weiner owned all the shares of Products, except for qualifying shares; and all the officers and directors of Products and the several subsidiaries were Weiner, his wife, his son, and his secretary. Weiner was president and treasurer of Products and of each of the subsidiaries, including Artware.

Artware in 1949 gave Products a promissory note secured by a mortgage on Artware's property allegedly for advances made. In 1952 Artware made an assignment to Products in partial satisfaction of its indebtedness. In 1953 the Board applied to the Court of Appeals for an order restraining that assignment. It also asked for an order of discovery, alleging that the affairs of Products and Artware were being conducted in such a way as to dissipate Artware's assets and to avoid making the back wage payments. The court denied these motions, holding that, until the amount of back pay was liquidated and payment of the fixed sum refused, there was no warrant for granting that relief (207 F. 2d 798), the court stating that if upon liquidation of Artware "any financial inability" on its part to pay the awards was shown to be "the result of improper actions on its part in the meantime, appropriate contempt action can then be taken." *Id.*, at 802.

At that time, the Board had not issued an order determining the specific amounts of back pay owed the individual employees. In 1955—nearly two years later—it made that determination and entered an order, directing payment of back pay totaling about $300,000; and the Court of Appeals ordered Artware, "its officers, agents, successors, and assigns" to pay that amount to specified employees. 228 F. 2d 871. That was on December 16, 1955.

In 1957 the Board moved the Court of Appeals for discovery, inspection, and depositions, naming Artware, Weiner, Products, and the other subsidiaries of Products. It alleged that Weiner had caused the assets of Artware to be siphoned off through the other corporations under his control for the purpose of evading the back pay obligation. The Court of Appeals denied the motion, 251 F. 2d 183, holding that a contempt proceeding, rather than discovery, was the proper procedure.

On August 20, 1958, the Board petitioned the Court of Appeals to hold Artware, Weiner, Products, and the other subsidiaries in civil contempt for failure to pay the amounts due employees under the back pay order. On October 11, 1958, the Board renewed its motion for discovery, inspection, and the taking of depositions from Artware, the affiliated corporations, and Weiner and other officers of these corporations.

In its petition the Board made charges of dealings between these corporations and between them and Weiner occurring from 1949 to 1955 which, it maintained, showed both (1) fraud and wrong-doing for the purpose of frustrating the back pay order and (2) the operation of these various corporations "as a single enterprise," each of the corporations performing "a particular function, as a department or division of the one enterprise in the manufacture, sale, and distribution of the common product." The allegations (which are summarized in the opinion below, 261 F. 2d 503, 506–507) need not be repeated here, as the Court of Appeals merely held that, although the enforcement order was entered July 30, 1952, it was not made specific as to amounts owed until December 16, 1955. It, therefore, concluded that prior to the latter date, the decree was "not sufficiently definite and mandatory to serve as the basis for contempt proceedings." *Id.*, at 510. It, therefore, dismissed the Board's petition for

adjudication in civil contempt. It also denied the Board's motion for discovery, inspection, and depositions. 261 F. 2d 503, 510. The case is here on a petition for certiorari, 359 U. S. 983, which we granted in order to consider the validity of the action of the Court of Appeals in dismissing the petition insofar as it charged the existence of "a single enterprise."

The Court of Appeals dismissed the petition without considering the second group of allegations made by the Board *viz.* that these various corporations were in fact "a single enterprise." And it denied the motion for discovery even as it pertained to that alternative theory of liability. It may have done so because it thought that the issues tendered in the petition related solely to inter-company transactions alleged to be conveyances in fraud of creditors or preferences in favor of some creditors. That seemed to be its preoccupation, as evident by its references to possible causes of action under Kentucky law to set those transactions aside. *Id.*, at 509.

We do not stop to consider what would be a proper formulation of a rule of law governing liability in contempt for frustration of a decree. The Court of Appeals may have considered the transactions and assignments as if they were made between separate and distinct corporations. If they are viewed in that light, we cannot say they are so colorable as to warrant us in reversing the Court of Appeals. But we think the Board is entitled to show that these separate corporations are not what they appear to be, that in truth they are but divisions or departments of a "single enterprise." That is the alternative theory of liability which the Court of Appeals did not consider. We think that the Board is entitled to a hearing on that alternative theory and to discovery in aid of it.

The question whether the corporations under Weiner's ownership were only departments or divisions in one single enterprise is in a different family than those that arise under either 13 Eliz. or the modern law of preferences. Whether one corporation is liable for the obligations of an affiliate turns on other considerations. The insulation of a stockholder from the debts and obligations of his corporation is the norm, not the exception. *See Pullman Car Co. v. Missouri Pacific R. Co.*, 115 U. S. 587, 597. Yet as Mr. Justice Cardozo said in *Berkey v. Third Avenue R. Co.*, 244 N. Y. 84, 95, "Dominion may be so complete, interference so obtrusive, that by the general rules of agency the parent will be a principal and the subsidiary an agent. Where the control is less than this, we are remitted to the tests of honesty and justice." That is not a complete catalogue. The several companies may be represented as one.[1] Apart from that is the question whether in fact the economic enterprise is one, the corporate forms being largely paper arrangements that do not reflect the business realities. One company may in fact be operated as a division of another;[2] one may be only a shell, inadequately financed;[3] the affairs of the group may be so intermingled that no distinct corporate lines are main-

[1] *See Platt v. Bradner Co.*, 131 Wash. 573. *Cf. American Nat. Bank v. National Wall Paper Co.*, 77 F. 85, 91.

[2] *See Ezard Co. v. Maryland*, 216 F. 827, 829; *Portsmouth Cotton Oil Corp. v. Fourth Nat. Bank*, 280 F. 879; *Dillard & Collins Co. v. Richmond Cotton Oil Co.*, 140 Tenn. 200, 206; *Costas v. Manila Electric Co.*, 24 F. 2d 383, 384–385. *Cf. United States v. Delaware, L. & W. R. Co.*, 238 U. S. 516, 529; *Chicago, M. & St. P. R. Co. v. Minneapolis Civic Assn.*, 247 U. S. 490, 500–502; *Erickson v. Minnesota & Ontario Power Co.*, 134 Minn. 209, 213–215.

[3] *See Lackenbach S. S. Co. v. W. R. Grace & Co.*, 267 F. 676, 681; *Oriental Investment Co. v. Barclay*, 64 S. W. 80, 86–87. For discussion of the situation where a company is "deliberately kept judgment-proof" see *Weisser v. Mursam Shoe Corp.*, 127 F. 2d 344, 346.

tained.' These are some, though by no means all, of the relevant considerations, as the authorities recognize. See Lattin on Corporations (1959) §§ 13, 14; Stevens on Corporations (1949) § 17; Berle, The Theory of Enterprise Entity, 47 Col. L. Rev. 343.

We do not intimate an opinion on the merits of this alternative theory of liability. The authorities we have cited merely indicate the range of inquiry which the petition of the Board presented. Discovery is useful in determining what the facts are. It is, indeed, necessary to determine whether the decree of the court enforcing the Board's order should run to any of the affiliated corporations or their stockholders. When the facts are resolved it will be time enough to consider what further enforcing decree, if any, would be appropriate.

The petition should be reinstated insofar as it charges the existence of "a single enterprise" and the motion for discovery should be granted so that the Board will have an opportunity to prove those allegations.

Reversed.

MR. JUSTICE STEWART took no part in the consideration or decision of this case.

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[1] *See Fla. Water & Gas Dist.*, 252 F. 35, 38; *Wichita Falls & S. R. Co. v. Pendleton*, 53 Okla. 463, 502, 505; *Cf. Lehigh Valley R. Co.*, 220 U. S. 257, 272, 274.

[2] *Cf. Texas Sulphur Co. v. Freeport Texas Co.*, 251 F. 962; *Harlan Public Service Co. v. Eastern Coals Co.*, 254 Ky. 143.

[3] *Cf. Reid Knitting Co. v. Labor Board*, 324 U. S. [illegible]

SUPREME COURT OF THE UNITED STATES

No. 46. October Term, 1959

National Labor Relations Board, Petitioner, v. Deena Artware, Inc., et al.	On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[February 23, 1960.]

Mr. Justice Frankfurter, whom Mr. Justice Harlan joins, concurring in reversal on the grounds hereinafter stated.

Due regard for the controlling facts in this case will have their legal significance. This requires that the facts and the procedural setting in which they are to be considered be stated with particularity.

The respondents are an individual and several corporations. The individual respondent, one Weiner, is the sole stockholder, except for qualifying shares, of Deena Products (Products), an Illinois corporation engaged in the manufacture and sale of lamps. The remaining respondents are wholly owned subsidiaries of Products. They are Deena Artware (Artware), a now defunct Kentucky corporation which formerly engaged in the manufacture of china urns for use as lamp bases; Deena of Arlington, another Kentucky corporation, engaged in the production of shades and the assembly of lamps; Suppi Products Company (Suppi), a Kentucky corporation engaged, as was Artware formerly, in the manufacture of china urns, for use as lamp bases; and Industrial Realty Company (Industrial), a Kentucky corporation organized to hold title to the physical assets formerly held by Artware. Weiner has at all relevant times completely controlled Products, which in turn has similarly dominated all of the respondent subsidiaries. Weiner served as President,

Treasurer[1] and a director of all of the corporations; his wife, son and successive secretaries as the other directors.

Artware was organized by Products in 1946, and shortly thereafter acquired a factory for the production of lamp bases at Paducah, Kentucky. In 1947 construction was undertaken, allegedly by Products, of a lamp assembly plant adjacent to the Artware plant at Paducah. At about the same time the labor dispute arose which led to the Labor Board orders underlying this proceeding. On October 25, 1949 Artware was found by the Board to have violated § 8 (a) (1), (3) and (5) of the National Labor Relations Act (as amended) and was ordered *inter alia*, to reinstate with back pay sixty-six named employees whose discharge during the dispute was found to have been improper. 86 N. L. R. B. 732, 736. On July 30, 1952, the Court of Appeals for the Sixth Circuit at the Board's petition, granted enforcement of its order 198 F. 2d 645. At about the same time that court also sustained Artware's recovery against the union of a money judgment for injuries it sustained by virtue of a secondary boycott engaged in by the union during the same dispute 198 F. 2d 637.

The Board then petitioned the Court of Appeals for an injunction against payment of a part of the judgment Artware had recovered against the union, alleging that Artware had undertaken to render itself unable to pay any back pay in the amounts which the Board was authorized to fix by virtue of the court's order of July 30, 1952. The Court of Appeals refused the injunction primarily upon the ground that the definite amount of back pay owing under its order had not yet been determined by the Board. The court noted that if, after such determination, it appeared that Artware had acted improperly, the court

[1] The respondents' answer denies that Werner was in fact Treasurer of Artware or the other subsidiaries.

could deal with the matter in contempt proceedings. 207 F. 2d 798.

As a result of the proceedings to fix the amount of back pay, the Board, by an order of April 21, 1955, directed Artware to pay the back pay it owed various employees in specified amounts totalling about $300,000. 112 N. L. R. B. 371. This order was sustained by the Court of Appeals. 228 F. 2d 871. On a showing that Artware was entirely without assets, that it had ceased operations on April 24, 1953, and had, on November 24, 1954, transferred all its assets to Products, purportedly in satisfaction of a mortgage, the Board sought a discovery order in the Court of Appeals to inquire into the disposition of Artware's assets. The Board proceeded on the assumption that discovery would reveal facts requiring payment of Artware's back-pay debt by the companies affiliated with it. Discovery was denied (one judge dissenting). 251 F. 2d 183. The court's ground for denying discovery was, surprisingly enough, that the Board should first test the legal sufficiency of a complaint charging respondents with contempt. The Board thereupon filed this petition alleging contempt of the court's decree of enforcement of July 30, 1952, and renewed its motion for discovery.

The Board's petition charged that pursuant to a plan to frustrate the award of back pay against Deena Artware, conceived by Weiner during or shortly after the dispute with the union and carried out by him through exercise of his control of Products and all its subsidiaries, all of the assets of Artware were systematically transferred to Products and its other subsidiaries for the purpose of rendering Artware unable to pay any back-pay order that might thereafter be enforced against it. It alleged that acts in pursuance of that plan occurred after and therefore in contempt of the decree of the Court of Appeals which was entered on July 30, 1952. All of the acts al-

leged in pursuance of the plan occurred before the entry of the 1955 decree affirming the Board's order to pay specific amounts. The Board charged that Weiner and Products prevented Artware from showing any operating profits and thereby accumulating assets in the ordinary course of its business, by causing Artware to lower the price at which it sold urns to Products, so that Artware showed losses while Products made substantial profits, and that Weiner and Products caused Artware to issue notes, secured by mortgages on all of its assets, to Products, for which Artware received nothing in return, in order that Artware's assets could be, as they were, transferred to Products after Artware was adjudicated liable to pay back pay. The Board alleged the following:

1. Early in 1948, after Artware, under Weiner's direction, had committed the unfair labor practices so found by the Board, Products began to treat the new assembly plant construction at Paducah adjacent to Artware's plant as if it had been undertaken by Artware, and not, as was the fact, by itself. Artware therefore recorded the losses resulting from abandonment of that construction in July 1948. Nevertheless, when Products undertook alternative new construction at Arlington for the same purpose it used the construction materials, engineering and architectural plans and services, and other services and materials, which it had already charged to Artware, and did so without paying Artware or crediting it with their value.

2. Products thereafter made further use of its purported shift of the Paducah construction to Deena Artware. About October 31, 1949, a few days after the Board issued its order directing, *inter alia*, that Artware pay back pay, Products and Weiner caused Artware to execute a note to Products in the amount of $75,459.65, payable within five years, and secured by a mortgage on all the real and personal property of Artware, purportedly in return for advances by Products for the construction at Paducah

despite the fact that the construction had been abandoned more than a year before, and had been undertaken not by Artware, but by Products. A second note, similarly secured, was issued about September 19, 1952, in the amount of $5,797.74. On November 24, 1954, after the Court of Appeals' first enforcement order of July 30, 1952, but before the Board's fixation of the amounts due on April 21, 1955, Weiner and Products caused Artware to transfer to Products all of its assets in satisfaction of these mortgages. In December 1952 Products and Weiner also caused Artware to assign to Products part of the proceeds of the judgment Artware had recovered against the union as additional security for its obligations to Products. In January 1954, $19,320.97 of Artware's recovery was received by Products, the remainder having been assigned to Artware's counsel in payment of attorney's fees.

3. Beginning about March 1949, after the hearing on the Board's complaint against Artware, Products and Weiner caused Artware to lower its prices to Products, causing inflation of Products' profits, and operating losses to Artware.

4. About April 24, 1953, Products and Weiner caused Artware to cease all operations. From that time until November 24, 1954, Products and Sippi used Artware's plant premises, facilities and properties at Paducah, without payment to Artware, and Products obtained from Sippi the supplies it had formerly secured from Artware. On November 24, 1954, Products and Weiner caused Artware to transfer all its assets to Products in satisfaction of its obligations which then, with accrued interest (at 6% payable semi-annually but not theretofore paid), totaled $105,000, leaving, as Artware's sole unsatisfied obligation, the back-pay order. Thereafter Sippi continued to use the Artware facilities, title to which, about May 4, 1955, Products caused to be transferred to the newly created subsidiary, Industrial. About November 17, 1955, Prod-

ucts and Weiner caused Industrial to lease the facili
formally to Sippi; and since December 1, 1955, Sippi
operated the Artware facilities in the same manner a
to the same end as did Artware formerly.

The Court of Appeals, on respondents' motion, d
missed the complaint for failure to state a cause of act
and denied the Board's accompanying motion for d
covery. It held that since its order of July 30, 19
in affirming the Board's determination of liability
back pay which the Board had not yet individualized
not specify the exact monetary amount which Artwa
owed its various employees, it was "not sufficiently d
nite and mandatory" to sustain an adjudication of c
tempt. The basis of this conclusion was not a constr
tion by the court of the special terms of its own decr
This was in terms the order entered by the Board. T
court applied what it believed to be a general princi
of law that an enforcement decree of a Board order det
mining liability for back pay, but leaving for a later sta
determination of the specific amounts due to in
vidual employees, is too indefinite to sustain contem
proceedings.

The respondents urge in support of the decision be
that after the 1952 decree Artware was entitled to a f
ther administrative hearing to determine whether t
conduct of the named employees after their wrong
discharge disentitled them to recover, and that des
the 1952 decree it might therefore ultimately be det
mined that Artware was not in fact obligated to ma
any payment whatever. It follows, the argument r
that since the Board's 1952 order did not purport to ad
dicate a liability free of defenses to make back-pay pa
ments, it could not, for purposes of such payments
considered final. Accordingly, the 1952 decree which
terms enforced it could not embody a final mandate e

cerning the payments disobedience of which would constitute contempt.[2]

The Board concedes that the 1952 decree having been entered before any determination of specific amounts owing, it did not direct present payment to be made, and that respondent Artware could not be held in contempt for failure to make payment before the entry of the 1955 decree. But it urges that the 1952 decree could and did impose an immediate and definite obligation upon Artware not to design and execute a plan for the very purpose of disabling itself from obeying the decree which had definitively adjudicated its obligation to pay whatever would be found to be the dollar-and-cents amount of its theretofore established liability. If the allegations in the petition for contempt are sustained by proof, there can be no doubt that Artware disregarded this obligation not to frustrate the 1952 decree.

The vital question of the legal implications of enforcement of a Board order rendered in an unfair labor practice proceeding directing reinstatement and payment of back pay, was the sole question dealt with in the opinion below. It was the primary issue between the parties here. It is the issue for our decision. The Board's procedure in unfair labor practice cases is first to hold a hearing to determine whether an unfair labor practice was committed, and, if it was, whether it would "effectuate the policies" of the Act for the Board to order reinstatement with back pay of any employees who were discharged. § 10 (c). In such a proceeding the Board does not concern itself with the amount of back pay actually owing. This is excluded from the proceeding in the interest of

[2] The question involved here was not presented for decision in *National Labor Relations Board v. New York Merchandise Co., Inc.*, 234 F. 2d 949. To the extent that the opinion in that case is inconsistent with the principles here announced, it is of course disapproved.

the efficient administration of the Act. The determination of specific liabilities may involve a protracted [illegible] test. An employee who is wrongfully discharged [illegible] for example, not be entitled to back pay because he has to accept other employment. *Phelps-Dodge Corp. v. Labor Board*, 313 U. S. 177, 197–200. Since the [illegible] mination that the discharge was wrongful is subject review, extensive proceedings to determine the [illegible] liability may be rendered superfluous by reversal. [illegible] the determination is sustained and becomes final, [illegible] be expedient for a respondent to reach agreement [illegible] avoid further litigation. The propriety of this statutory two-stage procedure of the Board in these back pay cases is not questioned.

It will not do to hold that because the Board's [illegible] mination of the duty to make back-pay payments does not result in fixed money judgments, no final order with regard to back pay is in fact entered or enforced. The Board is not, as respondents suggest, merely the [illegible] representative of the employees for recovery of [illegible] losses. Its primary function under § 10 (c), with which it makes specific monetary orders for [illegible] employees, is to prevent the conduct defined [illegible] labor practices in § 8. Section 10 (c) provides that if the Board determines that an unfair labor practice has occurred, it may make such remedial orders for [illegible] ment with back pay as will "effectuate the policies" of the Act. We have held that the Board is granted [illegible] cretion over the fashioning of remedial orders [illegible] provision. *Phelps-Dodge Corp. v. Labor Board*, [illegible] at 193–196.

National Licorice Co. v. Labor Board, 309 U. S. 350, [illegible]. We there held simply that a back pay order does not [illegible] owing to the United States and therefore not [illegible] § 64 (a) (5) of the Bankruptcy Act, 11 U. S. C. § 104 (a) (5).

It is plainly within that area of discretion for the Board to order an employer who is found to have violated § 8 by the discriminatory discharge of employees, to refrain from conduct which is solely designed to defeat any remedial back-pay order which may be entered when specific amounts are finally determined. It is equally appropriate for the Court of Appeals, by a decree enforcing the Board's order, to place him at the hazard that if an amount is found to be owing, such conduct subsequent to the decree may be found to be contumacious. The salient fact which brings the Board's remedial power into play under § 10 (c) is its finding that the employer's conduct constituted an unfair labor practice. The separation of that finding from the determination of amounts being a mechanically reasonable method for administering the Act, it is irrelevant that as yet undetermined matters subsequent to the discriminatory discharge may in fact entitle some or all of the employees to receive pay. Cf. *McComb v. Jacksonville Paper Co.*, 336 U. S. 187. Enforcement of such a Board order does not interfere with the ordinary conduct of the respondent's business or subject it unreasonably to the hazard of contempt. For decree is a form of assurance that business will be conducted with reference to business motives, and not with a view to evade the remedies designed to enforce the policies of the Act.

It is further urged however that even if power exists in the Board and the courts to enter and enforce such an order of liability for back pay in amounts to be ascertained the Act itself contained no such direction. But the decree, on its face, is an exercise of the equity power to act in advance to direct a specific course of conduct. To fail to enforce it at least the implied effect of a direction not to act solely for the purpose of defeating it, makes of it a mere lien less than a *lis pendens* and transmutes it

into a mockery. The Board's determinations are not merely administrative analogues of common-law judgments, and they do not purport to be. As here, they uniformly contain a specific direction to take "affirmative action." In enforcing the Board's orders the Courts of Appeals similarly act not merely to review a common-law judgment, but "to effectuate the policies" of the National Labor Relations Act by enforcement orders directing that action be taken to remove the unfair labor practice found to exist. Every affirmative order in equity carries with it the implicit command to refrain from action designed to defeat it. Such an implication may arise from the mere assumption of jurisdiction as to specific property. See *Merrimack River Savings Bank* v. *Clay Center*, 219 U. S. 527, 535–536. Here, although specific property is not involved, the 1952 order was more than an assumption of jurisdiction. It adjudicated a liability to redress the consequences of a discriminatory discharge. Implicit in that adjudication, and the direction to pay in which it was embodied, was the command to the respondent Deena Artware not to conduct its business and transfer all its assets for the sole purpose of evading the specific dollar-and-cents obligations in the offing. In the *Merrimack River Savings Bank* case, *supra*, the Court held that "the willful removal beyond the reach of the Court of the subject matter of the litigation or its destruction pending an appeal from a decree praying, among other things, an injunction to prevent such removal or destruction, and the right shall be determined is, in and of itself, a contempt of the appellate jurisdiction of this Court." 219 U. S., at 535–536. Our case is *a fortiori* governed by that principle. Here the Court of Appeals had already adjudicated that the respondents were subject to a liability for back-pay wages, and the individualization of the amounts flowing from this liability merely awaited the determination by the Board. The assumption that

money would be due to any of the workers is so fanciful as surely not to be made the basis of the legal assumption that although the Court of Appeals had adjudicated the liability of the respondents, no liability would follow. By putting beyond reach the means for satisfying the dollar-and-cents amount of their liability, the respondents certainly frustrated the Court of Appeals' power to effectuate enforcement of the liability which it had already established.

On the Board's allegations there can be no doubt of the liability of some or all of the other respondents in contempt. Weiner, Products and the subsidiaries are alleged to have been active participants in a deliberate scheme to frustrate enforcement of Artware's liability established by the 1952 decree. The alleged "relations and behaviours" of the several respondents are sufficient to bring them within the terms of Rule 65 (d) of the Federal Rules of Civil Procedure. *See Regal Knitwear* v. *Labor Board*, 324 U. S. 9, 14–15.

Accordingly, the petition for contempt should have been sustained, and an appropriate motion for discovery should have been granted. The ground here taken to sustain the petition of course makes it unnecessary to consider the Board's alternative theory that all respondents constitute a "single enterprise" and as such are liable in contempt for failure to pay the specific amounts decreed in 1955. That ground should of course be open for consideration by the Court of Appeals.